

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Shawn C. Northrup) Case No. 3:12-cv-01544-JJH
)
 Plaintiff) Judge Jeffrey J. Helmick
)
 vs.) **MOTION FOR LEAVE TO FILE AN**
) **AMENDED ANSWER**
)
 City of Toledo, et al.)
) Adam Loukx, Director of Law
 Defendants.) (0062158)
) John T. Madigan, Senior Attorney
) (0023614)
) City of Toledo, Department of Law
) One Government Center, Suite 2250
) Toledo, Ohio 43604-2293
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)
) Counsel for Defendants

Now come Defendants, City of Toledo, Officer D. Bright, Officer Donald Comes and Sergeant Daniel Ray, through Counsel, and move for an order of the court granting them leave to amend their complaint under Rule 15(a) and amending the court's scheduling order under Rule 16(b) of the Federal Rules of Civil Procedure to permit the filing of an amended answer. Defendants make this request in order to add an affirmative defense of statutory immunity to the state law claims alleged in the Plaintiff's complaint.

WHEREFORE, Defendants, Officer D. Bright, Donald Comes, Sergeant Daniel Ray and the City of Toledo, through Counsel, respectfully move for an order of the court granting them leave to file an amended complaint.

Respectfully submitted,
ADAM W. LOUKX, DIRECTOR OF LAW

/s/ John T. Madigan
John T. Madigan, Senior Attorney
Counsel for Defendants

MEMORANDUM

In claims for relief Seven (Respondeat Superior), Eight (Color of Law), Nine (Assault and Battery) and Ten (False Arrest and Malicious Prosecution) contained in his complaint the Plaintiff alleges violations of state laws. While this court is free to exercise jurisdiction over these claims or refer them to a state court for resolution, the Defendants believe that each are subject to the defense of governmental immunity contained in Chapter 2744 of the Ohio revised Code. This affirmative defense was inadvertently omitted from Defendants' answer. Permitting an amendment to the Defendants' answer at this time would not result in an unnecessary delay or cause undue hardship to the Plaintiff.

Rule 15(a) of the Federal Rules of Civil Procedure provides that "[t]he court should freely give leave when justice so requires." *See also Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) (holding refusal to grant leave to amend without any justification was an abuse of discretion); *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 421 (6th Cir. 2000) (holding [*4] denial was abuse of discretion and not harmless error based on futility); *Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir. 1986) (reversing denial of leave to amend). The Sixth Circuit takes a liberal approach to Rule 15(a). *Moore*, 790 F.2d at 562; *Minor v. Northville Public Schs.*, 605 F. Supp. 1185, 1201 (E.D. Mich. 1985). Leave to amend should be granted unless there is "undue delay, bad faith, or dilatory motive . . . repeated failure to cure deficiencies by amendments previously

allowed, undue prejudice to the opposing party, [] futility of amendment," or lack of notice to the opposing party. *Foman*, 371 U.S. at 182; see also *Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 458 (6th Cir. 2001) (noting lack of notice to opposing party as an additional factor); *Popp Telcom v. American Sharecom, Inc.*, 210 F.3d 928, 943 (8th Cir. 2000).

The Defendants are mindful that the court's scheduling order which set January 30, 2013 as a cutoff for amending pleadings has passed. But, as the court is aware, that scheduling order has since been modified to extend the discovery cutoff until September 30, 2013 and to vacate the deadline for dispositive motions previously set for August 30, 2013. Meanwhile, the Defendants have attempted to respond to discovery requests and resolve discovery issues. Depositions of the parties have yet to be scheduled so the Plaintiff will not be prejudiced by the inability to examine the Defendants concerning their affirmative defenses.

For these reasons the Defendants request that the court's scheduling order be revised to permit the filing of amended pleadings and grant Defendants leave to file an amended answer.

Respectfully submitted,

ADAM W. LOUKX, DIRECTOR OF LAW

/s/ John T. Madigan
John T. Madigan, Senior Attorney
Counsel for Defendant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing motion for leave to file an amended answer was sent by regular U.S. mail and electronically to Daniel T. Ellis, Esq., attorney for Plaintiff at: LYDY & MOAN, LTD. 4930 N. Holland-Sylvania Rd, Sylvania, Ohio 4356 this 25th day of July, 2013.

/s/ John T. Madigan
John T. Madigan, Senior Attorney